

LAU YEOK LIN & ORS.

v.

HIP SOON ENGINEERING & CONSTRUCTION SDN. BHD.

HIGH COURT MALAYA, Kuantan

Lamin Mohd. Yunus J

[Civil Suit No. 22-35-87]

15 March 1988

CIVIL PROCEDURE: *Order for attachment before judgment - Whether Senior Assistant Registrar has power to make the order - Affidavit in support of application sworn before writ was filed - Whether affidavit was valid.*

This was an appeal by the defendant against the decision of the Senior Assistant Registrar who refused to set aside an order for attachment before judgment. The subject matter of the dispute was the sale and purchase of secondhand equipment which the plaintiffs had agreed to purchase from the defendant. The plaintiffs took delivery of some equipment but were prevented from taking delivery of the remaining equipment. The grounds of appeal were that the Senior Assistant Registrar had no power to make the order; the affidavit in support of the application for attachment before judgment was not valid as it was dated earlier than the issue of the writ; and the proceedings were misconceived.

Held:

[1] By virtue of O. 32 r. 9 Rules of the High Court 1980, the Senior Assistant Registrar had the power to deal with matter under the Debtors Ordinance 1957 in particular that as laid down under O. 74 r. 5(1), Rules of the High Court 1980. The Chief Justice had not issued any directive pursuant to O. 32 r. 9 that the Senior Assistant Registrar could not exercise the powers under O. 74 r. 5(1).

[2] The affidavit in support of the application for attachment before Judgment which was sworn a day before the writ was filed was valid. The deponent was available for cross examination if required.

[3] The Order for attachment before Judgment was proper as s. 19(1)(c), Debtors Ordinance 1957 had been complied with.

[Application dismissed with costs.]

Cases referred to:

Hwang Ju-in v. Huang Han Chao [1977] 2 MLJ 229

H. Stacey v. Diamond & Metal Products & Anor. [1939] MLJ 249

Sri Melati case [1984] 1 MLJ 283

Ong Hock & Anor. v. Ooi Bee Tat & Ors. [1982] 2 MLJ 326

Legislation referred to:

Debtors Ordinance 1957, s. 19, (1)(c)

Rules of the High Court 1980, O. 32 r. 9, O. 35 r. 1(2), O. 74 rr. 5, (1)

For the plaintiffs/respondents - Jaya Ramachandran; M/s Balendren Chong Haraney & Bodi.

For the defendant/applicant - Anthony Fernandez; M/s Anthony Fernandez & Partners.

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JUDGMENT

Lamin Mohd. Yunus J:

b Briefly the facts of this case were that the plaintiffs, a second-hand dealer, entered into an oral agreement on or about 21 September 1987 with the defendants for the purchase of second-hand equipment from the defendants for the price of RM120,000 with the condition that the plaintiffs were required to sell back to the defendants certain specified equipment for a price of RM10,000. The terms of payment in respect of the RM120,000 purchase were reduced into writing (Ex. A1 to Encl. 2). When the plaintiffs had taken delivery about 50% of the equipment they were prevented from taking further delivery of the remaining equipment. The plaintiffs then sued the defendants and prayed *inter alia* for an order for attachment before judgment of the remaining equipment. Before filing the suit, the plaintiffs made various payments in the course of taking delivery of the equipment and the last was by a cheque dated 6 November 1987. After failing to take delivery of the remaining equipment, the plaintiffs received information that the equipment had been removed from the factory premises to a store and subsequently some of them were sold. They then applied to this Court *ex parte* for attachment before judgment under O. 74 r. 5 (Encl. 2). The Senior Assistant Registrar heard the application and granted the order on 13 November 1987. Susequently they applied to set aside the order (Encl. 7) but failed before the Senior Assistant Registrar. They now appeal against that decision on three grounds:

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- (a) Firstly, they object to the Senior Assistant Registrar making the order on the ground that she had no power to do so.
 - (b) Secondly, the affidavit of the plaintiff in support of his application for attachment before judgment was not valid on the ground that it was dated earlier than the issue of the writ.
 - (c) Thirdly, the proceedings were misconceived.

f On the first objection, I find that in view of the provisions of the law and in the light of the decision in the Singapore case of *Hwang Ju-in v. Huang Han Chao* [1977] 2 MLJ 229 I cannot agree with the contention of the learned Counsel for the applicant/defendant that the Senior Assistant Registrar had no power to grant the order as applied for. It is quite clear to me that by virtue of O. 32 r. 9 the Senior Assistant Registrar has the power to deal with matters under the Debtors Ordinance 1957 in particular that as laid down under O. 74 r. 5(1) of the Rules of the High Court 1980 (RHC 1980) because there is no direction by the Chief Justice that either she is not to exercise the powers under the said O. 74 r. 5(1) or that it shall only be exercised by the Judge in person or personally. Order 32 r. 9 of RHC 1980 stipulates:

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The Registrar shall have power to transact all such business etc. as may be transacted and exercised by a Judge in chambers except such business etc. as the Chief Justice may from time to time direct to be transacted .. by a Judge in person or as may by any of these rules be expressly directed to be transacted .. by a Judge in person.

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i The rule does not say that the Registrar “shall transact” and therefore r. 9 simply means that the registrar can exercise those powers as given to a judge in chambers. A Judge still retains all those powers as designated being those of “a judge in chambers”. It is only when the Chief Justice directs that in certain specified matters the Judge himself must attend or hear them the Registrar will be precluded from exercising his powers. I think O. 32 r. 9 was made for reasons of convenience in that for instance when the Registrar for some reason is unable to attend to a particular case, then the case will be put before a Judge.

The next objection is in regard to the validity of the affidavit in support of the application for attachment before judgment filed by the plaintiffs (Encl. 2). The affidavit in support was dated 12 November 1987 while the writ was dated one day after that is 13 November 1987. The learned Counsel for the applicant/defendant contended that the affidavit being sworn and dated one day earlier cannot be treated as being valid on the authority of the case of *H. Stacey v. Diamond & Metal Products & Anor.* [1939] MLJ 249 and therefore urged me to reject it in entirety and accordingly to set aside the order made by the SAR. In the *Stacey's* case Terrell J. was dealing with a situation where an affidavit of one Hunter, endorsed upon a letter written by him dated 12 July 1934 while the writ to the action that was going for trial was dated 10 August 1934, a difference of a little under one month. As Hunter had already died by the time the writ was issued, the question was whether his affidavit can be accepted in evidence under O. 35 r. 1(2) which provided that an order could be made that "any particular facts or facts may be proved by affidavit or that the affidavit of any witness may be read at the hearing or trial on such conditions as the Court or the Judge thinks reasonable." The learned Counsel submitted that the *Stacey's* case was in his favour and quoted the judgment of the Court:

The argument however that though affidavit can be sworn in an action which has not yet been commenced is on a different footing. This is more than an irregularity and makes the affidavit qua affidavit entirely inadmissible. Certainly there may be cases in which an affidavit sworn a day or two previously, or even affidavits which have not been sworn, have been used on interlocutory applications, on Counsel's undertaking that the affidavit shall be re-sworn or sworn and filed as the case may be. But when the strict rules are relaxed in such instances the principle is not sacrificed, as the Court acts on the assumption that Counsel's undertaking will be honoured, and when that has been done the requirement of the Court's practice have been fully complied with.

In *Stacey's* case the element of the death of Hunter was of primary consideration and therefore the question of non-availability of witness became the subject for substantial discussion. The Court said:

Hunter's letter therefore is *prima facie* inadmissible as an affidavit in these proceedings and as he is dead it never can become admissible by being resworn.

Even if from any point of view it could be treated as an affidavit in an intended action there is still the fatal objection that the plaintiff has never had the opportunity of cross-examination Hunter.

In the "*Sri Melati*" case [1984] 1 MLJ 283 the learned judge distinguished the *Stacey's* case. He said (p. 285):

In *Stacey's* case the affidavit was to be used to prove facts at a trial at which issues were to be adjudicated on and that the deponent was dead. In this case no such facts were being proved. The affidavit was in support of a request for a warrant of arrest of a vessel in an admiralty action. Both the affidavit and the request for warrant were filed, according to the Court records after the filing of the writ. The trial of the issues are not before the Court. (The law only requires that warrant of arrest should be issued after the issue of writ). The deponent is always available for cross-examination but no application has been made to do so.

I am unable to accept the contention of the learned Counsel that Arulanandom J was wrong in his interpretation of the *Stacey's* case on the ground that he relied on the element of the death of the deponent. The death of the deponent (Hunter) was relevant and a material point to be considered as it was a case which required the production of evidence at a trial.

- a* As regard the date of the affidavit the learned judge saw nothing improper as it had been filed according to the Rules. In the present case before me the difference was only one day. In fact, the affidavit was sworn on the afternoon of 12 November 1987 and the statement of claim accompanying the writ was dated the same day. The writ was filed in the Registry on the following day i.e. the 13th. If, in the present case, it is insisted upon that there was still that difference of one day, I am of the view that it did not affect its validity unless it can be
- b* shown that it is improper which the learned Counsel for the defendant applicant had not done. Similarly in the case of *Ong Hock & Anor. v. Ooi Bee Tat & Ors.* [1982] 2 MLJ 326, the affidavit in support of the application for injunction was sworn one day before the issue of the writ, and the learned judge did not find it improper. Also in the present case the question of non-availability of witness did not arise as he was available for cross-examination if requested for.
- c* The third objection by the learned Counsel for the defendant/applicant was that the action taken by the plaintiffs/respondents by applying for attachment was misconceived or improper. He maintained that the plaintiffs/repondents should have injuncted the defendant/applicant from removing his equipment from the factory. The plaintiffs/respondents, according to him, was not justified on the facts to proceed under s. 19 of the Debtors Ordinance 1957. In my
- d* view he is at liberty to choose any form of redress. Also from the facts as deposed I find that the plaintiffs/ respondents have satisfied s. 19(1)(c). The defendant/applicant had removed some of the goods from the factory and this was admitted and some he had even sold them. In the circumstances, I dismiss the application with costs.

Also found at [1988] 2 CLJ 76

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